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DAMAGES IN EU LAW

Andrea Biondi and Martin Farley\*

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I. Introduction

These are difficult times for the European legal order and its effective enforcement. Despite the positive impact of the Charter of Fundamental Rights, the perils to which the system of judicial protection is subjected is reflected by the debate on how violations of individual rights contained in European Union (EU) law can be adequately sanctioned. The heroic days of historical judgments are after all long gone and many criticisms have been levelled at whether the EU judiciary is still able to deliver an efficient and fair system of protection.<sup>1</sup> It is equally true that supranational judicial protection may no longer be as necessary as it once was owing to the maturity of the EU legal system. The progressive internalization of both the substantive and remedial dimension of EU law has gradually shifted the attention and the question of intensity of protection from the Luxembourg Court—for many years the supreme guardian of EU individual rights—to national authorities and domestic courts.<sup>2</sup>

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<sup>1</sup> J. Komarek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32(4) *European Law Review* 467; and M. Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

<sup>2</sup> The decentralization of the competition law regime following the introduction of Regulation 1/2003 and the increase in private enforcement of competition law is a particularly good example of the increased role that is now played by national regulators and judiciaries. Indeed, the adoption of Directive 2014/104 on antitrust damages actions places responsibility firmly in the hands of national courts to ensure that victims of anti-competitive conduct receive adequate redress through damages to compensate them for losses suffered as a result of breaches of EU competition law. See further below.

## II. Damages in EU Law: A Snapshot

Actions for damages are emblematic of this context: an extremely technical area that is, however, rich with constitutional symbols but which is ultimately concerned with the provision of very practical relief for the individuals affected. Opinions on all the above issues are usually rather polarized with some authors despairing on the current state of affairs and others with more optimistic views. The current contribution will attempt to recap the past, discuss the present, and risk some predictions on the scope of application of an action for damages in EU law in the future. It will analyse the question of adequate judicial protection based on compensation in damages through two ‘prisms’: first, as a specific remedy available to individuals to hold Member States—and to a more limited extent—private individuals—liable in damages where they violated EU law, and, secondly, as a right in damages for the direct liability of the European Union as represented through its institutions and as a derived liability of the Union as an employer.

## II. Damages in EU Law: A Snapshot

### A. From Community Liability to State Liability and Back

#### (1) *The Origins*

An action for damages has always been contemplated within the EU legal order. The European Coal and Steel Community Treaty provided for not just one but actually two kinds of action. Article 34 allowed undertakings to bring an action in damages for direct and particular injury in the event of the annulment of a Community act. Even more interestingly, Article 40 provided for a general clause of non-contractual liability. The Court was given jurisdiction ‘to assess damages against the Community, at the request of the injured party, in cases where injury results from a fault involved in an official act of the Community in execution of the present Treaty’.<sup>3</sup>

Article 40 became Article 215 in the EEC Treaty, was transformed into Article 288 of the EC Treaty (following the Treaty of Nice), and has finally become Article 340 of the Treaty on the Functioning of the European Union (TFEU). In the case of non-contractual liability, Article 340 TFEU provides that ‘the EU shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’. The European Union is then liable for both *fautes de service*—wrongful acts attributable to its institutions—and *fautes personnelles*—wrongful acts on the part of its employees. As in many national legal systems, such a general clause of non-contractual liability does not spell out the criteria to be employed to determine actual liability. Moreover, as is the case in many domestic systems, these gaps have been gradually filled by the case law of the European Court of Justice (CJEU), which has clarified that liability can only be ascertained if the following elements are present: the presence of actual damage, a causal link between the damage caused and the conduct alleged against the institution, and the illegality of such conduct.<sup>4</sup>

The case law of the Court delved deeper into those conditions and gradually developed a rather convoluted system that very rarely led to successful actions against the then European Community. In particular, the Court elaborated two different tests for establishing whether the Community could be held liable in damages depending on the classification of the

<sup>3</sup> For a general analysis of the law in those days see the several contributions in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 1997).

<sup>4</sup> See Case 4/69 *Alfons Lütticke GmbH v Commission* EU:C:1971:40, para 10; Case T-575/93 *Koelman v Commission* [1996] ECR II-1, EU:T:1996:1, para 89.

32. *Damages in EU Law*

measure in question as either an ‘administrative act’ or a ‘legislative act’. In relation to administrative acts, the Court determined that the requirement of unlawful conduct would be satisfied by any infringement of law. In relation to legislative measures, however, an unlawful act would only expose the Community to liability in damages if the breach in question constituted a sufficiently serious breach of a superior rule of law for the protection of individuals.<sup>5</sup>

(2) *Il Signor Francovich and Member State Liability*

The action for damages provisions only came to the fore when they began directly to affect the financial interests of Member States. After several years of cautious and oblique references to the possibility of holding Member States liable for violating their obligations under EU law,<sup>6</sup> in one of the most celebrated cases of the whole history of European Law, *Francovich v Italy*,<sup>7</sup> the European Court of Justice famously held that:

the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.<sup>8</sup>

This empathic statement of principle was a logical extension of the Court’s reasoning on the, by then, well-established constitutional doctrine of direct effect and on the need for national courts to ensure the full effectiveness of EU law.<sup>9</sup> It is not by chance that all of the ‘foundational cases’—*van Gend en Loos*, *Costa v ENEL*, *Simmenthal*, and *Factortame II*—are cited as precedent to support the Court’s findings in *Francovich*.<sup>10</sup> The ‘theory’ was swiftly followed by ‘practice’ in the subsequent case of *Brasserie du Pêcheur* and *Factortame*, which added flesh to the bones that had been created by the Court in *Francovich*.<sup>11</sup> In that case, the Court, specifically referencing Community liability as its source of inspiration, specified that the essential procedural conditions to bring an action for damages were that ‘the rule of law

<sup>5</sup> Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others v Commission* EU:T:1995:209; Joined Cases 261/78 and 262/78 *Interquell Strärke-Chemie v EEC* EU:C: 1982:329.

<sup>6</sup> See for an account N. Green and A. Barav, ‘Damages in the National Courts for Breach of Community Law’ (1986) 6 *Yearbook of European Law* 55.

<sup>7</sup> Joined Cases C-6 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357, EU:C:1991:428.

<sup>8</sup> *Ibid* paras 33 and 34.

<sup>9</sup> In these Brexit days, it might be useful to note that the EFTA Court came to the same conclusions when it held that: ‘it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible’. It also added that it is ‘natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability’. See Case E-9/97 *Sveinsbjörnsdóttir* [1998] EFTA Court Reports 95 (advisory opinion of 10 December 1998); [1999] 1 *Common Market Law Review* 884, paras 63 and 64. See further C. Baudenbacher, ‘If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court’s Sveinbjörnsdóttir Ruling’ (2009) 10(1) *Chicago Journal of International Law* 333.

<sup>10</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1, EU:C:1963:1; Case 6/64 *Costa v ENEL* [1964] ECR 585, EU:C:1964:66; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1968] ECR 629, EU:C:1978:49; and Case C-213/89 *Factortame* [1990] ECR I-2433, EU:C:1990:257.

<sup>11</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, EU:C:1996:79.

### III. *The Importance of Actions for Damages within the EU Legal Order*

infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties'.<sup>12</sup>

#### (3) *The Alignment of Liability Conditions*

Finally, in an elegantly performed U-turn, the Court 'reinterpreted' the conditions for triggering EU liability contained in Article 340 TFEU and aligned them to those laid down by the Court in *Brasserie du Pêcheur* and *Factortame* for the purposes of establishing Member State liability. In its ruling in *Bergaderm*,<sup>13</sup> the CJEU disposed of the old distinctions between administrative and legislative acts and held that the conditions elaborated in *Brasserie du Pêcheur* and *Factortame* should also be applied for actions for damages against EU institutions. If the aim of all human exploration is to arrive where we began (*bona pace* T. S. Eliot), the European legal order eventually obtained its own action of *neminem laedere* both against EU institutions and Member States.

## III. The Importance of Actions for Damages within the EU Legal Order

### A. The CJEU Case Law: Between Federalist Aspirations and Respect for the Rule of Law

#### (1) *Damages and the EU Constitutional Order*

The Italian Court's preliminary reference in the *Francovich* case posed two questions to the CJEU. The first was whether Mr Francovich was entitled to rely on the provisions of Directive 80/987,<sup>14</sup> which provided for the protection of employees in the event of redundancy. In particular, it provided for specific guarantees of payment of unpaid wage claims. Italy failed to implement the directive on time and it had also been condemned by the CJEU in a direct action.<sup>15</sup> Despite acknowledging the Member State's blatant violation of EU obligations, the CJEU replied that the relevant provisions of the Directive did not have direct effect as they were not sufficiently precise and unconditional so as to give rise to rights that individuals could enforce before the Italian court.

By its second question, the national court sought the CJEU's assistance on whether, despite the directive's lack of direct effect, an individual was nevertheless entitled to claim reparation of the loss and damage sustained as a result of the Italian State's failure to implement the Directive. If not, such individuals risked being deprived of any protection in such circumstances.

It would have been easier, and perhaps safer, for the Court to follow the Opinion of its Advocate General and merely refer to the general principles on non-contractual liability common to the national legal systems of the Member States and remind the national court of the need to ensure that an action of liability should not be made subject to excessively difficult conditions such as to impair the principle of effective application of EU law. Had it done so, the CJEU would have recast the imposition of liability in a slighter softer fashion.

<sup>12</sup> Ibid para 51.

<sup>13</sup> Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, EU:C:2000:361.

<sup>14</sup> Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23.

<sup>15</sup> Case 22/87 *Commission v Italy* [1989] ECR 143, EU:C:1989:45.

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The CJEU instead decided to deploy the most powerful weapon within its arsenal of EU law doctrine by forging a direct link between an action for damages and the need to ensure supremacy of the EU legal order: the need to ensure effectiveness of the application of EU law and guarantee respect for individual rights. The Court reiterated the same stance in *Brasserie du Pêcheur* and *Factortame*. In reply to the argument presented by Germany at the hearing, that a principle of liability should have been introduced by legislation (eg via a political consensus) and not via litigation, the CJEU reiterated that the Court's role was to ensure that the law was observed and, in doing so, due account was to be taken of the governing principles of the EU legal order, namely: the full effectiveness of Community rules and the effective protection of the rights which they confer; and the obligation to cooperate imposed on Member States by Article 5 of the Treaty (now Article 4(3) TEU).<sup>16</sup>

(2) *Damages and Federalist Aspirations*

Thus, liability in damages against a defaulting Member State was born with a constitutional status. It still debatable whether that was a blessing or a curse. Most of the initial comments were rather enthusiastic, commending the Court for reaffirming the centrality of the need to respect the rule of law<sup>17</sup> and for enhancing the catalogue of individual rights.<sup>18</sup> Others were much more critical and lamented what they saw as undue interferences with national law or an excessive emphasis on the imposition of sanctions.<sup>19</sup> The finding that an action for damages was available to individuals against Member States is, however, neither particularly surprising nor shocking if placed in the proper EU constitutional milieu;<sup>20</sup> or, in the more lively language of Advocate General Tesaro in *Brasserie du Pêcheur* and *Factortame*: 'far from being a moment of eccentricity in the case law of the Court, Francovich was completely consistent with and a logical extension of a value which has been upheld on several occasions without question in Luxembourg: effectiveness of Community provisions and hence complete judicial protection'.<sup>21</sup> However, the mere idea of making the Member State responsible for breaches of its 'supranational' obligations at the hands of one of its citizens was considered by some as 'revolutionary' and thus sometimes difficult to accept.<sup>22</sup> As noted elsewhere, it is peculiar that even in fully fledged federalist systems such as the USA, the loyalty of states towards the Federation stops when it is a question of financial compensation.<sup>23</sup>

<sup>16</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* (n 11) para 27.

<sup>17</sup> J. Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law' (1993) 18(1) *European Law Review* 3.

<sup>18</sup> W. Van Gerven, 'Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (1994) 1 *Maastricht Journal of European and Comparative Law* 6; W. Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*' (1996) 45 *International and Comparative Law Quarterly* 507.

<sup>19</sup> C. Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 199; and C. Harlow, 'A Common European Law of Remedies' in C. Kilpatrick, T. Novitz and P. Skidmore, *The Future of Remedies in Europe* (Hart Publishing 2000) 69. See also S. Douglas Scott and R. Caranta, 'Governmental Liability after *Francovich*' (1993) 52 *Cambridge Law Journal* 272; (. C. Harlow, *State Liability: Tort Law and Beyond* (OUP 2004) 57.

<sup>20</sup> A. Biondi and M. Farley, *The Right to Damages in European Law* (Kluwer 2009). See also T. Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 313 ff.

<sup>21</sup> See AG Tesaro's Opinion in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* (n 11) para 32.

<sup>22</sup> Some of the national courts decisions based on a sort of last century reading of state powers can only be explained because of the novelty to the state liability doctrine. See for instance the (in)famous Italian Court of Cassation, Sez III Civile, case no 4915 of 1 April 2003, in *Foro Italiano* I (2003), 2016.

<sup>23</sup> A. Biondi, 'In Praise of *Francovich*' in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 413. See also G. A. Berman, 'Member State Liability in the Member State's Own Court: An American Law Comparison' in N. Colneric and others (eds), *Une Communauté de droit, Festschrift Gil Carlos Rodriguez Iglesias* (BWV 2003) 305.



### III. *The Importance of Actions for Damages within the EU Legal Order*

In EU law, a liability action (especially if successful!) is tangible evidence of a loss of sovereignty as the individual, by appealing directly to the supranational authority, ‘reduced’ the Member State to just another tortfeasor. In this context, a further element should be emphasized. In its case law on the liability of Member States, the Court has always been extremely vigorous in denying any relevance of the internal allocation or intra-state differentiations within the Member State in question. In line with its rigid case law on direct actions under Article 263 TFEU,<sup>24</sup> the Court considered that a Member State should not be entitled to avoid claims in damages on the basis, for instance, of arguments such as the entity responsible for the potential breach of EU law being autonomous and independent from the central government. For instance, in *Konle*, a case dealing with the allocation of competences within the Austrian constitution, the Court held that a Member State ‘cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order to free itself from liability on that basis’.<sup>25</sup> Similarly, the decision to devolve certain legislative or administrative tasks to territorial bodies with a certain degree of autonomy, or to any other public law body legally distinct from the Member State, cannot prejudice an action for liability.<sup>26</sup>

Finally, the ‘stronger’ symbol of the federalist character of an action for damages must be the equally strong line of statements whereby the Court refused to draw any distinctions on the basis of whether the breach could be attributed to the legislator, regulatory authorities, administrative bodies, or even courts. In *Brasserie du Pêcheur* and *Factortame*, which concerned a potential breach of EU law by the German and British Parliaments, the Court emphatically declared that the principle of liability ‘holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach’.<sup>27</sup> The firmness of such statement was severely tested in the *Gerhard Köbler v Republic of Austria*<sup>28</sup> judgment. As is well known, in that judgment the CJEU confirmed the principle that Member States are obliged to make good damage caused to individuals even when this is caused by decisions of national courts infringing EU law. In its judgment, the Court reiterated its finding in *Brasserie du Pêcheur* and *Factortame* and with support of case law on liability of courts in the context of international law and the European Convention of Human Rights, whilst emphasizing the decisive role played by national courts in protecting EU individual rights, the Court concluded that the full effectiveness of EU rules conferring such rights would be brought into question if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State. Such an approach was deemed to be particularly appropriate with respect to courts adjudicating at last instance.<sup>29</sup> The judgment has attracted a copious amount of

<sup>24</sup> Case 77/69 *Commission v Belgium* [1970] ECR 237, EU:C:1970:34; and Case 169/82 *Commission v Italy* [1984] ECR 1603, EU:C:1984:126.

<sup>25</sup> Case C-302/97 *Konle v Austria* [1999] ECR I-3099, EU:C:1999:271, para 62.

<sup>26</sup> Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein (Haim II)* [2000] ECR I-5123, EU:C:2000:357, paras 31 and 32.

<sup>27</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* (n 11) para 32.

<sup>28</sup> Case C-224/01 *Köbler v Austria* ([2001] ECR I-10239, EU:C:2003:513).

<sup>29</sup> Case C-224/01 *Köbler* (n 28) paras 33–35. The CJEU has since confirmed that the same principle applies with respect to breaches committed by the CJEU itself or the General Court. See eg Case C-40/12 P *Gascogne Sack Deutschland v Commission* EU:C:2013:768, paras 80–103; Case C-58/12 P *Groupe Gascogne v Commission* EU:C:2013:770, paras 72–97; Case C-50/12 P *Kendrion v Commission* EU:C:2013:771 paras 38–63. See further Case T-577/14 *Gascogne Sack Deutschland and Gascogne v European Union* EU:T:2017:1; Case T-479/14 *Kendrion NV v European Union* EU:T:2017:48; and Case T-725/14 *Aalberts Industries NV v European Union* EU:T:2017:47.

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literature exposing numerous and sophisticated points of views.<sup>30</sup> Most of the criticisms are directed at the practical implications of such a judgment. However, as we are dealing with symbols, it is impossible not to see the dramatic implications that these judgments have in terms of sovereignty for the Member States. The issue is not, in our view, simply a question of a possible erosion of the holy principle of the independence of the judiciary, to which many commentators point. Rather, it is slightly subtler or, you may say, psychological. While of course Member States had, in one way or another, accepted that their actions could always be judicially reviewed and in some cases annulled or declared void, such acceptance did not, in many cases, foresee the sort of ignominy that an action for damages against its own courts could cause if found ‘guilty’ of having breached EU law. In a *Köbler* scenario, the Member State loses yet another essential state function: that is, the provision of an unbiased forum for a citizen who, having suffering personal injury, is now seeking relief. This time, the tortfeasor is the national court itself.

#### (3) Damages and the Principle of Good Administration

An action for damages has of course a second, important constitutional function: that of ensuring respect for the rule of law and to maximize judicial protection. Such a function is best exemplified if we now turn to actions for damages against EU institutions. For decades, the case law of the Court concerning, at the time, Community liability actions had been fiercely criticized for the excessive technicalities that, for many, constituted too high an obstacle for guaranteeing an effective remedy in compensation. Furthermore, an action in damages was for many years treated as a form of ancillary remedy in comparison to other forms of judicial review of Community action such as actions for annulment under, what is now, Article 263 TFEU.<sup>31</sup> In performing a sort of legal illusion in the *Bergaderm* case, the CJEU, which had once used the existence of the provision on actions in damages against Community institutions as one of the foundations for establishing a duty on Member States to compensate individuals in damages, re-interpreted the criteria for such an action by using the same conditions that it had laid down for Member State liability as the criteria that needed to be fulfilled for an action in damages against EU institutions.

Whether in reality the two actions are still governed by different conditions will be discussed below; however, the highly symbolic value of the *Bergaderm* decision is there to be seen. There are some echoes of a *Les Vertes* plea on the need to ensure full accountability for EU action<sup>32</sup> by stating that no differences should exist for citizens regardless of whether their individual rights have been breached by their Member State or by the supranational regulator. Furthermore, a sort of elevated status for actions for damages is confirmed by two further pieces of ‘evidence’. First, there is now a consistent line of case law that seems to confirm that the action for EU damages is now a totally autonomous form of action, implying that it should be considered independent from the question of whether a certain EU measure can be challenged by any other form of action, for instance in an action for annulment.<sup>33</sup> Secondly, actions for damages have now been formally enshrined in Article 41(3) of the

<sup>30</sup> For a useful overview see B. Beutler, ‘State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?’ (2009) 46 *Common Market Law Review* 773.

<sup>31</sup> See W. Van Gerven, ‘Taking Article 215(2) EC Seriously’ in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998) 35.

<sup>32</sup> Case 294/83 *Les Vertes v EP* [1986] ECR 133, EU:C:1986:166.

<sup>33</sup> Joined Cases T-440/03, 121, 171, 208, 365, and 484/04 *Arizmendi and Others v Council and Commission* [2009] ECR II-4883, EU:T:2009:530. See the discussion by K. Gutman, ‘The Evolution of the Action for Damages Against the European Union and Its Place in the System Of Judicial Protection’ (2011) 48 *Common Market Law Review* 695.



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Charter of Fundamental rights and it is one of the facets of the general principle of good administration.<sup>34</sup>

#### (4) The Limits of a Symbol: Damages against the Individual

Private liability for breaches of EU law is based on a sort of equation: the amount of literature is proportional to the little practical impact this had on the general EU law discourse. The same cannot be said for sectorial areas most notably competition law. The debate on the question of the rights and obligations imposed on individuals and on the outer limits of the doctrine of direct effect is certainly a debate worth continuing.<sup>35</sup> On the question of liability, when dealing with individuals, the emphasis, at least in the Court's case law, has always been based on traditionalist retribution/repressive ideas of damages. In the very much celebrated cases of *Courage*,<sup>36</sup> and later *Manfredi*<sup>37</sup> and *Kone*,<sup>38</sup> the Court supported the contention that a right in damages against another private party for breach of the competition rules must in principle be available for an individual for a 'loss caused by a contract or by conduct liable to restrict or distort competition'.<sup>39</sup> The Court rulings have been certainly decisive in leading to the adoption of Directive 2014/104 on antitrust damages.<sup>40</sup> However, it would be misleading to draw the conclusion that the Court was simply developing the *Francovich* doctrine so as to sketch a general principle of private party liability for breaches of EU law. The justification for the findings in *Courage* was firmly based on the need to strengthen the functioning of EU competition rules by developing private enforcement in addition to public enforcement so as to discourage agreements or practices that are liable to restrict or distort competition. This is eventually the model adopted by the Damages Directive. However, despite some empathic wording in the preamble—whereby it refers to the need for national courts, when ruling on competition law disputes between individuals, to 'protect subjective rights under EU law'—the Damages Directive does not establish any broader principles than had already been established by the CJEU in *Courage*. Rather, the Damages Directive simply reflects the decentralized antitrust model established by Regulation 1/2003, which increased the role played by national authorities and courts in enforcing the competition law rules under Articles 101 and 102 TFEU. The principal purpose of the Damages Directive is not to extend the substantive right to damages, but rather to ensure that the procedural rules governing actions for damages brought against individual undertakings for breaches of competition

<sup>34</sup> See H. C. H. Hofmann, G. C. Rowe, and A. H. Türk, *Administrative Law and Policy of the EU* (OUP 2011) ch 7 section F. In this context, it might be worth mentioning the discussion on the relationship on actions for damages for unlawful conduct and other forms of possible redress such as damages for lawful action and unjust enrichment. In a series of high profile cases the General Court and the CJEU sparred on the whether a general principle of non-contractual liability derived from national law compensation can be granted. See Joined Cases C-120 and 121/06 P *FLAMM and Others v Council and Commission* [2008] ECR I-6513, EU:T:2009:530, dismissing appeal against the decisions in Case T-69/00 *FLAMM and FLAMM Technologies v Council and Commission* [2005] ECR II-5393, EU:T:2005:449 and Case C-47/07 P *Masdar (UK) Ltd v Commission* [2008] ECR I-9761, EU:C:2008:726, dismissing appeal of Case T-333/03 *Masdar (UK) Ltd v Commission* [2006] ECR II-4377, EU:T:2006:348. The Court was reluctant to go down that road but reaffirmed the link between the need to respect fundamental rights and compensation.

<sup>35</sup> On the specific questions of damages against individuals see D. Leczykiewicz, 'Private Party Liability in EU law: In Search of the General Regime' (2009–10) 12 *Cambridge Yearbook of European Legal Studies*, 257.

<sup>36</sup> Case C-453/99 *Crehan v Courage Ltd* [2001] ECR I-6297, EU:C:2001:465.

<sup>37</sup> Case C-295/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, EU:C:2006:461.

<sup>38</sup> Case C-557/12 *Kone AG and Others* EU:C:2014:1317.

<sup>39</sup> Ibid para 26. See N. Dunne, 'Antitrust and the Making of European Tort Law' (2016) *Oxford Journal of Legal Studies* 36.

<sup>40</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L329/1.

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rules enable victims to exercise their rights to damages effectively and establish a system whereby private and public enforcement interact coherently so as to maximize the effectiveness of competition law enforcement.

Furthermore—to our knowledge—the only other time the Court relied on *Courage* outside the realm of competition law was to reaffirm that, in certain contexts, the availability of a compensation action can prompt competitors to take action to ensure fair trading and transparency of markets in the EU. As some have correctly noted,<sup>41</sup> the Court, contrary to the *Francovich* language in *Courage*, thus did not identify the necessity for an action in damages as a matter of right, but simply mandates the availability of damages.<sup>42</sup>

## IV. How Does an Action for Damages against Member States Work?

### A. Non-contractual Liability in Damages against the State

It is now time to turn to the specific rules regulating an action for damages. As set out in the previous section, the Court laid down three cumulative conditions that need to be satisfied in order for an action for damages to be successful: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured parties.<sup>43</sup>

#### (1) EU Law versus National Procedural Law

Despite the insistence of the Court that those conditions are ‘necessary and sufficient’ to found a right in favour of individuals to obtain compensation, in reality, they are not exhaustive. It is wise to reiterate that a *Francovich* action being so rooted in domestic law and ultimately granted by national courts, is subject to the specific provisions (and vagaries) of national procedural law. The ‘hybrid’<sup>44</sup> character of liability claims thus means that some essential elements such as the conditions to start litigation, causes of action, or most of the detailed procedural rules are left entirely to the domestic legal system. With one important caveat. This autonomy is a ‘qualified’ one as it is subject to the general principles of EU law of equivalence and effectiveness. As often observed by the Court, all of the material and formal conditions laid down by national procedural law on actions for damages cannot be less favourable than those relating to similar domestic claims and cannot be so framed as to make it, in practice, impossible or excessively difficult to obtain compensation.<sup>45</sup> These two conditions have been gradually subsumed into a general principle of effective judicial protection that—after the Charter of Fundamental Rights was made

<sup>41</sup> See Dunne (n 39).

<sup>42</sup> Case C-453/99 *Crehan v Courage Ltd* (n 38) para 26. To draw a parallel, in an essentially private–private legal scenario such as actions based on discrimination, starting with the seminal judgment in *Von Colson*, the Court insisted that any national implementing legislation should guarantee, in order to make effective the whole machinery of a directive, that adequate compensation in damages should be available to the individual complainant. See Case 14/83 *Von Colson* [1984] ECR 1891, EU:C:1984:153.

<sup>43</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 11). This three-part test is now routinely recited in the case law of the Court on damages action. See for instance Case C-446/04, *Test Claimants in the FII Group Litigation* EU:C:2006:774 or Case C-318/13 *Request for a Preliminary Ruling from the Korkein Hallinto-Oikeus* EU:C:2014:2133.

<sup>44</sup> N. Reich, ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’ (2007) 44 *Common Market Law Review* 707.

<sup>45</sup> See, to that effect, Joined Cases C-6 and C-9/90 *Francovich and Others v Italy* (n 7) para 43; and Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food* EU:C:1998:151, para 111.

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legally binding following the entry into force of the Treaty of Lisbon—has been elevated to the status of a fundamental right.<sup>46</sup>

Despite the emphatic tone of some of the Court's judgments in this area, dealing with the minutiae of national law is not always straightforward and the Luxembourg *acquis* can, at times, be somewhat *flexible*. For instance, in certain areas the Court seems content to model the EU claims entirely on national law. Effective judicial protection in claims for damages, for instance, has rarely troubled national limitation periods.<sup>47</sup> On the contrary, in other contexts the Court felt it necessary to encroach more markedly into the sphere of national procedural rules. For instance, in *Trasportes Urbanos*, the question was whether Spanish law, under which, if the breach was contained in legislation, an action for damages against the Member State was subject to a condition requiring the prior exhaustion of national remedies against a harmful administrative action, was compatible with EU law. Spanish law did not subject actions for damages to a prior exhaustion rule when these actions were alleging a breach of a constitutional right. The Court decided to go through a very detailed analysis of the national law in question and eventually concluded that, as actions for state liability under EU law and ~~the one~~ for damages for a breach of the Spanish Constitution were similar, Spanish law breached the principle of equivalence. Similarly, it hinted that, although the exhaustion of prior remedies is not per se objectionable from an effectiveness principle perspective, it could become so if this means that the applicant would be burdened with excessive procedural constraints and in cases where the other forms of actions are not easily actionable.<sup>48</sup>

##### (2) The First Condition: Conferral of Rights for the Protection of Individuals

The first condition that needs to be satisfied for an action for damages against a Member State to succeed is that the EU rule infringed must be intended to confer rights on individuals. As these criteria deal entirely with the application of EU law, the Court is of course fully entitled to determine its scope.<sup>49</sup> An analysis of the case law in our view reveals a 'double' function of this rights-centred condition. On the one hand, it is essential in reinforcing the narrative of the EU legal order as 'new' because of its individual rights protection focus. On the other, it is there as a procedural device as it works as a gatekeeper in limiting the kind of actions that can be brought against Member States. In this sense, it does evoke the traditional case law of the Court on EU liability where it required the breach of 'a superior rule of law for the protection of individuals' to trigger an action for damages. It seems to us that the case law also evolved according to the evolution of the norms and rights that gradually become 'accepted' as worth protecting. For instance, the Court was eager to lend its authority to the new European consumer litigant on the basis of strongly individual oriented but carefully worded Directives. In several cases, the Court fully recognized<sup>50</sup> that, of those, passengers and tourists have to be recognized as recipients of individual rights.<sup>51</sup>

<sup>46</sup> Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft GmbH v Bundesrepublik Deutschland* [2010] ECR I-13849, EU:C:2009:725.

<sup>47</sup> Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, EU:C:1997:351; Case C-295/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* (n 37) para 79; and Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* EU:C:2009:178.

<sup>48</sup> See also Case C-397/98 *Metallgesellschaft and Others* [2001] ECR I-1727, EU:C:2001:134 and Case C-243/09 *Fuß* [2010] ECR I-09849, EU:C:2010:609.

<sup>49</sup> Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food* (n 45).

<sup>50</sup> Directive 90/314 ECC on Package Travel Directive 90/314/EEC, [1990] OJ, L158/59. See Joined Cases C-178–179/94 and C-188–190/94 *Dillenkofer and Others v Bundesrepublik Deutschland* [1996] ECR I-4845, EU:C:1996:375; Case C-140/97 *Rechberger and Geindl v Austria* [1999] ECR I-3499, EU:C:1999:306.

<sup>51</sup> Conversely, the Court has been very restrained in accepting that harmonization upon which the process of creating the internal market is based could be equated to the existence of certain specific rights. For instance, it denied that a directive that requires Member States to notify draft technical regulations to the

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The same process may happen in other areas. For instance, the Court was more reluctant to intervene in cases with potential abstract numbers of litigants. The *Peter Paul*<sup>52</sup> case is particularly relevant in this regard. The controversy concerned the possibility for a group of individuals who had lost their deposits because of the collapse of a number of German banks to seek damages from the Member State. The applicants argued that the competent authorities failed to implement some of the EU banking directives,<sup>53</sup> which, if properly implemented, would have protected deposits and would have ‘forced’ Germany to exercise a more effective supervisory role. The CJEU held that the Directives did not grant depositors a specific right to have the competent authorities adopt supervisory measures in their interest. The Court also observed in general that banking law directives and rules on supervisory obligations were based on considerations relating to the complexity of banking supervision, in the context of which the authorities were under an obligation to protect a plurality of interests, including, more specifically, the stability of the financial system. Those directives could not be interpreted, therefore, as conferring specific rights on individuals. The case dates from 2004. Since then the protection of depositors and banks’ accountability has become ‘mainstream’ and even the object of specific EU legislation.<sup>54</sup>

Interestingly, there is a hint of a possible revisiting of the strict approach taken by the Court in *Peter Paul* in the recent controversy involving an action brought by a series of depositors against the measures under the European Stability Mechanism (ESM) umbrella by the Euro group, the European Central Bank (ECB) and the International Monetary Fund (IMF) for the restructuring of the Cypriot banking sector. It was argued that the EU was liable in damages for the losses that the applicants had suffered as a consequence of those measures. Although the main thrust of the case focused on whether a Euro group statement or the Memorandum of Understanding finalized between the ESM and Cyprus can be imputed to the Commission or to the ECB, so that the EU Courts have jurisdiction, in his Opinion, Advocate General Wahl raised an interesting point about damages. Advocate General Wahl considered that the loss claimed to have been suffered by the individuals on account of the finalization of the Memorandum of Understanding between the ESM and Cyprus was not caused by an institution of the EU since, first, the ESM is not an institution of the EU and, secondly, the adoption of the Memorandum of Understanding cannot be regarded as originating from the Commission or the ECB (the duties conferred on the Commission and the ECB within the ESM Treaty entail no power to make decisions of their own and commit the ESM alone).<sup>55</sup> Nevertheless, the Advocate General opined that since the Member State is responsible for the Memorandum of Understanding, the individuals who consider themselves to be prejudiced by this memorandum could potentially bring actions before national courts or tribunals and seek to have the Member State concerned held liable. In conclusion, the CJEU appears, understandably, to be wary of opening the gate to an *actio popularis* in damages. However, the notion of EU rights is naturally subject to continuous evolution.

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Commission could be considered as creating individual rights, as it does not ‘define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. See Case C-443/98 *Unilever* ECLI EU:C:2000:496, para 51 and Case C-98/14 *Berlington Hungary* ECLI EU:C:2015:386.

<sup>52</sup> Case C-222/02 *Peter Paul v Bundesrepublik Deutschland* [2004] ECR I-9425, EU:C:2004:606. See also for some similar albeit not identical conclusions the EFTA Court decision in Case E-16/11, *EFTA v Iceland* [2013] EFTA Ct Rep 4, ITL 052 (EFTA 2013) (28 January 2013).

<sup>53</sup> Directive 94/19 [1994] OJ L135/5.

<sup>54</sup> Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms (BRRD), OJ L173 (12 June 2014) 190.

<sup>55</sup> Opinion of AG Wahl in Case C-8/15 P *Ledra Advertising Ltd* EU:C:2016:701. The Court in its judgment of 20 September 2016 did not address the point raised by its Advocate General.

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##### (3) The Second Condition: Serious Breach

Much of the discussion in the Court's case law has focused on the second condition for Member State liability: a Member State will not be liable in damages unless it has committed a sufficiently serious breach of EU law. The current picture, after more than ten years of decisions and commentary, seems relatively clear. First and foremost, the seriousness of the breach must be related and measured against the clarity and precision of the EU legal provision at stake.<sup>56</sup> Thus, in straightforward cases such as the failure to implement a directive in time,<sup>57</sup> or where the provision in question could be considered as just an administrative formality,<sup>58</sup> the seriousness of the breach is 'automatically' satisfied. The reverse is also true: so where the EU provisions are either ambiguous or confer a wide discretionary power on the Member States,<sup>59</sup> or even when the case law of the Court of Justice might be particularly complex,<sup>60</sup> other factors need to be taken into account. These factors, which, in our view, can be considered as neither cumulative nor exhaustive,<sup>61</sup> were famously indicated in *Brasserie du Pêcheur* and *Factortame*. The Court considered that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned 'manifestly and gravely disregarded the limits on its discretion'.<sup>62</sup> The Court continued, however, by adding other elements that had to be taken into account in establishing the seriousness of the breach. These elements include 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law'.<sup>63</sup>

The two components—abuse of discretion/other factors—of the serious breach conditions are obviously intertwined. As the Court stated in an often neglected judgment that dealt essentially with the interpretation of same directive that led to the *Francovich* case, *Robins*, the Court held that while the amount of discretion enjoyed by Member States is certainly an important factor for establishing whether the second condition of the liability test has been fulfilled, it is nevertheless 'dependent on the degree of clarity and precision of the rule infringed'.<sup>64</sup> Thus, the technique of the Court is usually not to adjudicate directly on the seriousness of the breach, which is generally, at least formally, left to the assessment of the national court but to limit itself to providing guidance on the meaning and implications of the EU rule at stake. It goes without saying that in carrying out such an operation, the national court in practice is left in no doubt as to what the CJEU really thinks about the seriousness of the breach.<sup>65</sup>

<sup>56</sup> Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein (Haim II)* (n 26) para 40.

<sup>57</sup> Case C-63/01 *Samuel Sidney Evans v Secretary of State for the Environment, Transport and the Regions* [2003] ECR I-14447, EU:C:2003:650; Case C-150/99 *Sweden v Lindöpark* EU:C:2001:34.

<sup>58</sup> Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553, EU:C:1996:205; and Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio, Tarmo Lehtinen* [2007] ECR I-2749, EU:C:2007:213.

<sup>59</sup> Case C-392/93 *The Queen v HM Treasury, ex parte British Telecommunications plc* ECR 1996 I-1631) EU:C:1996:131.

<sup>60</sup> Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR I-2107.

<sup>61</sup> See Opinion of Advocate-General Jacobs in Case C-150/99 *Sweden v Lindöpark Lindöpark* (n 57).

<sup>62</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 11) para 55.

<sup>63</sup> *Ibid* paras 56–57.

<sup>64</sup> Case C-278/05 *Robins and Others* EU:C:2007:56, paras 72 and 73. See also Case C-452/06 *Synthon* EU: C: 2008:565,

<sup>65</sup> Two clear examples are Case C-278/05 *Robins and Others* (n 64) and, on the interpretation of the age discrimination directive, Case C-501/12 *Thomas Specht* EU:C:2014:2005, para 105. In the latter case, the



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The ‘scenario’ where the Court went the extra mile in detailing what a serious breach could mean is on liability for breaches committed by national courts. In the much-discussed *Köbler* judgment, the Court had to assess whether the fact that the Austrian court failed to apply a CJEU judgment and/or to make a preliminary reference could lead to compensation. On the question of the seriousness of the breach, the Court found that the breach by the national court was not manifest. It relied on the argument that there was no EU law provision that expressly covered the point of law at issue and, secondly, that the infringement was not intentional but rather a result of an incorrect reading of a judgment of the Court.

Similarly, in a subsequent ruling, the CJEU confirmed<sup>66</sup> that, although national courts are not ‘immune’ from the state liability principle, damage caused to individuals by reason of an infringement of EU law, attributable to a national court adjudicating at last instance, could be incurred in exceptional cases where that court had manifestly infringed the applicable law. The emphasis on the ‘manifest’ nature of the EU law infringement is clearly a considerable limitation on the possibility of bringing a successful claim against the national judiciary. The adjective ‘manifest’ is of course resonant of the same expression used in the context of liability in damages of EU institutions. In this context—as discussed below—the Court set a very high bar requiring the applicant to show that the harmful act of the EU institution is so serious as to render the conduct of that institution ‘manifest and grave’ and bordering on the arbitrary.<sup>67</sup>

In the context of liability in damages for a failure by the national judiciary, the explanation of such a standard lies in two factors: first—in our view rather sensibly—in the acknowledgment of the very nature of the difficult art of ‘adjudicating’ that is, the ‘interpretation of provisions of law and the evaluation of facts and the evidence’,<sup>68</sup> and secondly in the ‘political’ imperative for the CJEU not to compromise the delicate but vital dialogue with all judges across the Member States. It is clear that, faced with a virtual conflict of the duty/right to refer and the possibility of liability in damages, the Court attempted to ‘minimise’ the harshness of damages actions. Some reassurances are also contained in a recent case where the Court clarified that the seriousness of a breach can thus never be based on whether action (to refer or not to refer) was taken on the basis of Article 267 TFEU, but only from the interpretation provided by the CJEU. The discretion of the national courts would be limited excessively ‘if the exercise of that discretion were a decisive factor in determining whether or not there had been an obvious infringement of EU law, in order to appraise, where appropriate, the liability of the Member State concerned for infringement of EU law’.<sup>69</sup>

#### (4) *The Third Condition: Causation*

The third condition necessary to establish liability of a Member State in damages is—as in any domestic system of tort law—the existence of a causal link between the breach committed by the Member State and the damage suffered by the individuals. In tort law, the existence of such a causal link is usually determined by an evaluation of questions of fact and acquired evidence assessed in light of flexible general benchmarks such as the foreseeability of harm, its proximity, or even its proportionality. It is thus a criterion that naturally lends

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Court, after a long analysis of the directive and the freedom enjoyed by Member States concluded, nearly obiter in some circumstances, that it would have to be held that there was no sufficiently serious infringement before that date

<sup>66</sup> Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, EU:C:2006:391.

<sup>67</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 975, EU:C:1971:116.

<sup>68</sup> Case C-173/03 *Traghetti del Mediterraneo* (n 66) para 34.

<sup>69</sup> Case C-244/13 *Ogieriakhi* EU:C:2014:2068, para 54.



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itself to a ‘purely domestic’ determination and it is true that in most of the cases the CJEU simply defers its assessment to national courts, thereby implicitly accepting a certain degree of variation in the ‘day to day’ application of the state liability remedy. This is all true subject, however, to the general principle that all national laws, even those that are strictly procedural, need to be interpreted in accordance with EU law and in manner that safeguards the effective application of EU law.<sup>70</sup>

Thus, in some, very specific, contexts, the Court has felt it necessary to assess the existence of a causal link itself. For instance, in *Rechberger, Geindl and Others v Austria*<sup>71</sup> the Court in dealing with the Austrian implementation of the Package Travel Directive<sup>72</sup> held that, as the Directive had created a results-orientated obligation—that is to say compensation and repatriation ‘in the event of the travel organiser’s bankruptcy’<sup>73</sup> excluding liability because of non-specific, exceptional and unforeseeable events would have rendered the EU right impossible to protect. In practice, what the Court did was to conflate causality and the first condition—the scope and determination of the EU right in question.

## V. How Does an Action for Damages against the EU Work?

The right to recover damages from the EU is governed by Articles 268 and 340 TFEU, which, together, provide that an individual will be entitled to compensation in the event that an EU institution has caused loss in the performance of its duties, and that the CJEU will have exclusive competence with respect to such claims. Article 340(1) TFEU regulates the situation where an EU institution has entered into a formal contract with an individual and subsequently breached the terms of that contract. Article 340(2) TFEU, however, seeks to address the situation where an EU institution has caused loss through the exercise of its legislative, administrative or executive functions (so-called non-contractual liability). The following pages focus on non-contractual liability of the EU under Article 340(2) TFEU and deal with each of the elements for a claim for damages: admissibility; the substantive test for liability; causation; and compensation. As set out above, these elements are cumulative in nature. As such, failure to satisfy the requirements of any one of these criteria will result in the application being rejected without the Courts being required to examine the other criteria.<sup>74</sup>

Moreover, even before an applicant gets as far as the substantive criteria, there are numerous procedural hurdles that need to be overcome. Many of these hurdles—such as the need for

<sup>70</sup> In Case C-94/10 *Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet* [2011] ECR I-9963, EU:C:2001:674, para 36, the Court held that the national legal system could not interpret the condition of a direct causal link in such a way as to make it virtually impossible or excessively difficult to obtain compensation for the damage suffered.

<sup>71</sup> Case C-140/97 *Rechberger and Geindl v Austria* (n 50).

<sup>72</sup> Council Directive 90/314/EEC (n 50).

<sup>73</sup> Case C-140/97 *Rechberger and Geindl v Austria* (n 50) para 74.

<sup>74</sup> Case T-121/08 *PC-Ware Information Technologies v Commission* EU:T:2010:183, paras 105–106; Case T-589/08 *Evropaiki Dynamiki v Commission* EU:T:2011:73, para 112; Case T-514/09 *bpost v Commission* EU:T:2011:689, para 167; Case T-587/10 *Interspeed v Commission* EU:T:2012:355, paras 38 and 56; Case T-114/11 *Giordano v Commission* EU:T:2012:585, paras 12–13; Case T-668/11 *VIP Car Solutions v Parlement* EU:T:2013:302, paras 34, 35, and 38; Case T-415/10 *Nexans France v Joint Undertaking Fusion for Energy* EU:T:2013:141, paras 179–180; Order of 17 July 2014 in Case C-643/13 P *Melkveebedrijf Overenk v Commission* EU:C:2014:2118, para 25; Joined Cases T-91/12 and T-280/12 *Flying Holding v Commission* EU:T:2014:832, paras 115 and 118; Order of 13 January 2015 in Case T-579/13 *Istituto di vigilanza dell’urbe v Commission* EU:T:2015:27, paras 75–76; Joined Cases T-539/12 and T-150/13 *Ziegler and Ziegler Relocation v Commission* EU:T:2015:15, paras 59 and 60.

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the applicant to have standing; the need to respect the relevant limitation period; the need bring a claim against an entity subject to the relevant provision—are equivalent to those that need to be satisfied for other forms of action. Actions for damages against EU institutions, however, also entail a number of additional procedural elements that need to be satisfied if an applicant is to stand any chance of succeeding in its action.

The first of these requirements concerns the relationship between actions for damages and other forms of action. In particular, any ruling on the substantive merit of an action for damages will necessarily need to deal with the legality of the measure in question. This raises the question of whether the applicant should first be required to challenge the legality of the measure—for example by way of an action for annulment under Article 263 TFEU—before being able to seek damages.

The second additional hurdle stems from the fact that Article 268 TFEU grants the CJEU exclusive competence to hear only actions based on acts of EU institutions. All other non-contractual damages claims fall within the jurisdiction of national courts.<sup>75</sup> In many cases, there will be any number of different actors involved in adopting the measure that has allegedly caused the applicant harm. For example, directives need to be implemented by Member States. In such cases, which measure caused the harm—the directive or the implementing measure? The answer to this question determines which court will have jurisdiction (the EU Courts or the national courts) and, ultimately, the admissibility of the applicant's claim.

#### A. Procedural Rules Governing the Application of Article 340(2) TFEU

##### (1) Classical Questions of Admissibility

Turning first to the classical questions of admissibility, any natural or legal person, who claims to have been injured by an act of the EU or one of its servants, has the possibility of bringing an action against the EU under Article 340(2) TFEU.<sup>76</sup> In the case of legal persons, applicants must show that the damage affects their own assets, and that they are bringing their claim in their capacity as a legal person.<sup>77</sup> While this criterion will not ordinarily pose any difficulty for private enterprises, associations or trade unions will only have standing to bring a claim on behalf of their members if the members have assigned their right to bring an action to the association seeking to bring the claim.<sup>78</sup>

Actions for damages may only be brought in respect of acts or omissions of the EU. If the EU is not the author of the act or conduct, there can be no liability on the part of the EU under Article 340(2) TFEU.<sup>79</sup> It follows from this that a claim cannot be brought for damage

<sup>75</sup> Case 101/78 *Granaria* EU:C:1979:38 paras 14–16; Joined Cases C-67–85/75 *Dumortier Frères and Others v Commission* EU:C:1976:42, para 7; Case C-282/90 *Vreugdenhil v Commission (Vreugdenhil II)* EU:C:1992:124, para 12.

<sup>76</sup> Case 118/83 *CMC Cooperativa muratori e cementisti and Others v Commission* EU:C:1985:308, para 31. This applies, regardless of whether or not the applicant is a European citizen—see Case 119/77 *Nippon Seiko v Council and Commission* EU:C:1979:93; Case 239/82 *Allied Corporation and Others v Commission* EU:C:1984:68.

<sup>77</sup> Case 114/83 *Société d'Initiatives et de Coopération Agricole v Commission* EU:C:1984:246, paras 3–5; Case 289/83 *Groupeement des Associations Agricoles pour l'Organisation de la Production et de la Commercialisation des Pommes de Terre et Légumes de la Région Malouine (GAARM) and Others v Commission* EU:C:1984:398, paras 4–5; Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others v Commission* (n 5) para 76.

<sup>78</sup> Case 114/83 *Société d'Initiatives et de Coopération Agricole v Commission* (n 77) paras 3–5 and 20–22; Case 267/80 *Birra Wührer SpA and Others v Council and Commission* EU:C:1985:427.

<sup>79</sup> Order in Case C-520/12 P *DES v Commission* EU:C:2013:457 paras 35–38; Order in Case T-298/13 *Ledra Advertising v Commission* EU:T:2014:986, paras 42–47.

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caused arising out of an act of primary law, for example damage caused as a direct result of a Treaty amendment. Any Treaty, which seeks to amend the ~~original EC Treaty~~ is an act of the Member States and cannot be ascribed to the EU.<sup>80</sup>

With respect to the entities against which an action may be brought, in the strict sense, it is the EU that must be regarded as the defendant in actions brought under Article 340(2) TFEU and not the institutions, for they have no legal personality.<sup>81</sup> The EU will then be represented by the institution or institutions against which the matter giving rise to liability is alleged.<sup>82</sup> The Court, however, has generally been prepared to accept both cases that bring an action against a specific institution, as well as claims brought against the EU as a whole, provided that it does not affect the rights of the defence.<sup>83</sup>

In respect of the institutions whose actions could cause the EU to be liable in damages, Article 340(2) TFEU encompasses measures adopted by the institutions listed in Article 13 TEU,<sup>84</sup> including the EU Courts themselves.<sup>85</sup> Article 340(3) TFEU also provides that acts of the European Central Bank fall within the scope of Article 340(2) TFEU. The Court has also been prepared to hear cases brought against the European Investment Bank,<sup>86</sup> and the European Ombudsman.<sup>87</sup> The EU can only be liable for damage where the injury has been caused by an official act—that is, where the act was undertaken in the performance of the servant's duties. Where this is not the case, then the servant will be personally liable before the national courts.<sup>88</sup>

With regard to the period within which a claim must be brought, Article 46 of the Statute of the Court of Justice provides that matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event-giving rise to the damage. The time limit does not begin to run until the damage has materialized.<sup>89</sup> Where the full extent of the damage does not materialize immediately, but develops over a period of time, the damages claim will continue to be admissible, but only in so far as the applicant seeks

<sup>80</sup> Case 169/73 *Compagnie Continentale France v Council of the European Communities* EU:C:1975:13, para 16; Joined Cases 31 and 35/86 *Levantina Agrícola Industrial SA (LAISA) and CPC España SA v Council of the European Communities* EU:C:1988:211, paras 19–22; Joined Cases 63–69/72 *Wilhelm Werhahn Hansamühle and Others v Council of the European Communities* EU:C:1973:121, para 8; Case C-353/88 *Briantex and Di Domenico v Commission* EU:C:1989:415, para 7; Case T-209/00 *Lamberts v European Ombudsman* EU:T:2002:94, para 48; Case T-383/00 *Beamglow v Parliament and Others* EU:T:2005:453 para 69; Order of 2 February 2015 in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v European Union* (n 29) paras 14–20; Order of 6 January 2015, Case T-479/14 *Kendrion NV v European Union* (n 29).

<sup>81</sup> Case 302/87 *European Parliament v Council* EU:C:1988:461, para 9.

<sup>82</sup> Joined Cases 63–69/72 *Wilhelm Werhahn Hansamühle and Others v Council of the European Communities* (n 80); Case C-353/88 *Briantex and Di Domenico v Commission* (n 80) para 7; Case T-246/93 *Bühning v Council and Commission* EU:T:1998:21, para 26; Case T-383/00 *Beamglow v Parliament and Others* (n 80) para 68; Order of 6 September 2011 in Case T-292/09 *Mugraby v Council and Commission* EU:T:2011:418, para 24.

<sup>83</sup> Compare the claims brought in Case 106/81 *Julius Kind KG v EEC* EU:C:1982:291; and in Case T-246/93 *Günther Bühning v Council of the European Union and Commission of the European Communities* (n 82).

<sup>84</sup> Despite previous case law to the contrary (see Case T-346/03 *Krikorian and Others v European Parliament and Others* EU:T:2003:348, para 17), following the adoption of the ~~Lisbon Treaty~~ and the abolition of the distinction between the European Communities and the European Union, acts of the European Council should now also be subject to TFEU art 340(2).

<sup>85</sup> Case C-40/12 P *Gascogne Sack Deutschland v Commission* (n 29) paras 80–103; Case C-58/12 P *Groupe Gascogne v Commission* (n 29) paras 72–97; Case C-50/12 P *Kendrion v Commission* (n 29) paras 38–63.

<sup>86</sup> Case C-370/89 *SGEEM and Etroy v EIB* EU:C:1993:202, para 16.

<sup>87</sup> Case T-209/00 *Lamberts v European Ombudsman* (n 80).

<sup>88</sup> Case 5/68 *Claude Sayag and SA Zurich v Jean-Pierre Leduc and Others* EU:C:1968:42.

<sup>89</sup> Case 267/80 *Birra Wührer and Others v Council and Commission* (n 78).

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compensation for damage arising during a period not longer than five years from the time at which the action is brought.<sup>90</sup>

#### (2) Procedural Rules: Independent Form of Action

Despite the inherent link between legality of the act in question and the applicant's entitlement to damages, actions brought under Article 340(2) TFEU constitute an independent form of action distinct from other forms of action before the EU Courts. This is because the purpose underlying actions brought under Article 340 TFEU is different to that, for example, of actions for annulment brought under Article 263 TFEU or actions for failure to act under Article 265 TFEU. In contrast to these provisions, the primary purpose of Article 340 TFEU is to establish a form of financial redress for individuals who have suffered loss as a result of the actions of the institutions, rather than to pronounce specifically on the validity of the measure in question.<sup>91</sup> As such, as a general rule, it is not necessary to bring either an action for a failure to act or an action for annulment before being able to a claim for damages, or even have standing to bring such a claim, for such a prerequisite would be contrary to the independent nature of Article 340 TFEU.<sup>92</sup> Consequently, a claim for damages will be admissible in cases where the injuries result from an act or a failure to act, which the individual either could not challenge or which was of a general character.<sup>93</sup> However, the independence of actions under Article 340(2) TFEU is not absolute, and it cannot be used as a means to circumvent the (much) shorter limitation period applicable in respect of actions brought under Articles 263 or 265 TFEU. As such, where the individual is the direct addressee of the act, and, therefore, clearly has standing to bring an action for annulment—and failed to do so, such an action will be declared inadmissible, unless or until the applicant has brought an action for annulment under Article 263 TFEU.<sup>94</sup> Similarly, if the EU Courts have already assessed the legality of a measure—either by way of a previous direct action or preliminary ruling—a subsequent action under Article 340(2) TFEU cannot call into question the EU Courts' previous ruling.<sup>95</sup>

#### (3) Procedural Rules: Which Court Has Jurisdiction?

As mentioned at the outset of this section, the Courts only have exclusive jurisdiction in respect of actions or damages based on acts of the relevant EU institutions. As such, an action for damages based directly on an act or omission of an institution will clearly fall within the jurisdiction of the Courts. In many situations, although an underlying act might originate from an EU institution, it is the authorities of Member States who implement those rules. For example, an EU measures requiring importers to obtain permits from national authorities for the importation of goods into the EU is adopted by the EU, but it is implemented by the national authority, which decides whether to grant the licence.<sup>96</sup> In such situations, in the event of illegality, which entity should be liable for damages—the EU institution that

<sup>90</sup> Case T-174/00 *Biret International SA v Council* EU:T:2002:2.

<sup>91</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* (n 67) para 3; Case C-131/03 P *Reynolds Tobacco v Commission* EU:C:2006:541, paras 82–84; Case T-135/09 *Nexans France and Nexans v Commission* EU:T:2012:596, para 133; Case T-47/02 *Danzer v Council* EU:T:2006:167.

<sup>92</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* (n 67); Case 4/69 *Alfons Lütticke GmbH v Commission* (n 4) para 6.

<sup>93</sup> See eg Case 281/82 *Société à responsabilité limitée Unifrex v Commission and Council* EU:C:1984:165.

<sup>94</sup> Case 4/67 *Anne Muller (née Collignon) v Commission* EU:C:1967:51.

<sup>95</sup> Case T-291/04 *Enviro Tech Europe and Enviro Tech International v Commission* EU:T:2011:760, para 138; Order of 13 December 1999 in Case T-268/94 *Tyco Toys and Others v Commission and Council* EU:T:1999:316, para 24.

<sup>96</sup> Judgment in Joined Cases 5, 7, and 13–24/66 *Kampffmeyer and Others v Commission* EU:C:1967:31.

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adopted the act or the national entity that implemented it? The answer to this question will determine which court has jurisdiction. In making such a determination, the CJEU has distinguished between two different situations: (i) those situations in which the national authorities incorrectly apply EU law; and (ii) those situations in which the national authorities correctly apply EU law.

With respect to the first situation, the author of the wrongful act is clearly the national authority. As such any action for damages lies against the national authority before the national courts on the basis of the *Francovich/Brasserie du Pêcheur/Factortame* line of case law and no action can lie against the EU on the basis of Article 340 TFEU.<sup>97</sup>

Concerning the second situation, where it is the underlying EU law provision which is unlawful, the CJEU has ruled that a claim must be brought against the measure adopted by the national authorities before the national courts in these situations as well<sup>98</sup>—provided that the national courts have the power to afford the applicant effective judicial protection, including the award of compensation.<sup>99</sup> If no such form of redress exists before the national court, this should render an action before the EU Courts under Article 340(2) TFEU admissible.<sup>100</sup> While the CJEU's position in this respect may, on its face, appear counter-intuitive, the justification lies both in the scope of Article 268 TFEU and the test of causation: the act that caused the harm emanated from the national authority. It is, therefore, this act that was the cause of the harm—and such act falls outside of the scope of the Court's competence as defined by Article 268 TFEU.

A third situation of 'concurrent' liability may also arise, whereby both the national authority and the EU institutions are responsible for the measure. Such a situation may arise, for example, where an act of a national authority is not in conformity with EU law, but, nevertheless, has obtained approval from the Commission. The CJEU has held that in such situations of concurrent liability, an applicant seeking damages must, in general, first seek redress against national authorities before the national courts. It is only once this prerequisite has been complied with that the applicant may then bring proceedings under Article 340(2) TFEU (the so-called 'exhaustion rule'). In the event that an applicant fails to comply with the exhaustion rule, the EU Courts will declare an action under Article 340(2) TFEU inadmissible.<sup>101</sup> If an applicant lodges two applications at the same time—one before the EU Courts against the EU institutions and one before the national courts against the national authorities—seeking compensation for the same injury—which could result in the applicant being either over compensated or under compensated, the EU Courts will wait until the national court has given judgment before ruling on the existence and the quantum of any damage payable by the EU institutions.<sup>102</sup>

<sup>97</sup> Joined Cases 89 and 91/86 *Etoile Commerciale and CNTA v Commission* EU:C:1987:337 paras 16–19; Case T-261/94 *Schulte v Council and Commission* EU:T:2002:27 para 52; Case T-571/93 *Lefebvre v Commission* EU:T:1995:163, para 66.

<sup>98</sup> Case 281/82 *Société à responsabilité limitée Unifrex v Commission and Council* (n 93) paras 11–12; Case T-47/02 *Danzer v Council* (n 91) para 33.

<sup>99</sup> Case 281/82 *Société à responsabilité limitée Unifrex v Commission and Council* (n 93) paras 11–12.

<sup>100</sup> Case 197/80 *Ludwigshöfener Walzmühle v Council and Commission* EU:C:1981:311 para 9; Case T-317/12 *Holcim (Romania) v Commission* EU:T:2014:782, paras 74–75.

<sup>101</sup> Case 96/71 *R & V Haegeman v Commission* EU:C:1972:88; Case 281/82 *Société à responsabilité limitée Unifrex v Commission and Council* (n 93).

<sup>102</sup> Case 30/66 *Becher v Commission* EU:C:1967:33; and Case T-138/03 *É.R. and Others v Council and Commission* EU:T:2006:390, para 42.



32. *Damages in EU Law***B. Substantive Rules under Article 340(2) TFEU**

As set out in the first section of this chapter, following its ruling in *Brasserie du Pêcheur* and *Factortame*,<sup>103</sup> the original distinction that the CJEU had drawn between legislative and administrative acts for the purposes of determining the relevant substantive test that needed to be satisfied in actions for damages against the EU became untenable. Consequently, in its ruling in *Bergaderm*,<sup>104</sup> the CJEU chose, instead, to concentrate on the amount of discretion enjoyed by the EU institution. In doing so, the CJEU applied the conditions it had set down in *Brasserie du Pêcheur* and *Factortame*. In order to succeed in an action for damages against an EU institution, therefore, the applicant must show that: (i) the rule of law infringed conferred rights on individuals; (ii) the breach was sufficiently serious; and (iii) there is a direct causal link between the breach and the harm suffered.

*(1) Rules Conferring Rights on Individuals*

Regardless of the seriousness of an EU institution's potential breach, an applicant will only be entitled to recover damages where the rule in question is intended to confer rights on individuals. That condition is met if the rule in question, even if it (principally) concerns interests of a general nature, also protects the individual interests of the persons concerned,<sup>105</sup> regardless of the nature and scope of the act alleged to be unlawful, and, in particular, of the question whether the act affects a closed group or a limited number of persons.<sup>106</sup> As such, breaches of the EU Charter of Fundamental Rights are capable of giving rise to actions for damages under Article 340(2) TFEU.<sup>107</sup> To this end, the Courts have rejected claims in respect of provisions specifically intended to organize the division of powers between national authorities and the Commission,<sup>108</sup> or which govern the EU's relationship with the World Trade Organization.<sup>109</sup>

*(2) Sufficiently Serious Breach*

The requirement of a sufficiently serious breach seeks, whatever the unlawful nature of the measure in question, to avoid a situation where the risk of having to bear the losses alleged by applicants hinders the ability of the EU institution to exercise fully its competences in the general interest, regardless of the general or individual nature of the measure,<sup>110</sup> but without leaving third parties to bear the consequences of flagrant and inexcusable misconduct by the

<sup>103</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* (n 11).

<sup>104</sup> Case C-352/98 P *Bergaderm and Goupil v Commission* (n 15).

<sup>105</sup> See, to that effect, Joined Cases 5, 7, and 13–24/66 *Kampffmeyer and Others v Commission* (n 96); Case T-209/00 *Lamberts v European Ombudsman Lamberts v Ombudsman* (n 80) para 87.

<sup>106</sup> Case T-341/07 *Jose Maria Sison v Council* EU:T:2011:687, paras 47 and 52.

<sup>107</sup> Case C-578/11 P *Deltafina v Commission* EU:C:2014:1742; Case C-467/13 P *ICF v Commission* EU:C:2014:2274; Case C-40/12 P *Gascogne Sack Deutschland v Commission* (n 29) paras 80–103; Case C-58/12 P *Groupe Gascogne v Commission* (n 29) paras 72–97; Case C-50/12 P *Kendrion v Commission* (n 29) paras 38–63; Case C-243/12 P *FLS Plast v Commission* EU:C:2014:2006.

<sup>108</sup> Case T-429/05 *Artegodan v Commission* EU:T:2010:60, paras 72–75. Case C-282/90 *Vreugdenhil v Commission (Vreugdenhil II)* (n 75) paras 20–21. See also Case 106/81 *Julius Kind v EEC* (n 83), in which the Court held that insufficient reasoning—which normally is a ground for illegality—is not a breach of a superior rule for the protection of individuals, and is not therefore sufficient to ground a claim in damages under TFEU art 340(2).

<sup>109</sup> See Case T-18/99 *Cordis Obst und Gemüse Großhandel v Commission* EU:T:2001:95, paras 46 and 51; Case T-174/00 *Biret International v Council* (n 90) paras 60–64; Case T-69/00 *FIAMM and FIAMM Technologies* (n 34) paras 108–15.

<sup>110</sup> Case T-429/05 *Artegodan v Commission* (n 108) para 54; Case C-312/00 P *Commission v Camar and Tico* EU:C:2002:736, para 55; Case C-472/00 P *Commission v Fresh Marine* EU:C:2003:399, para 27; Case T-28/03 *Holcim (Deutschland) v Commission* EU:T:2005:139, para 48; and Case T-155/99 *Dieckmann & Hansen v Commission* EU:T:2001:256, para 45.



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institution.<sup>111</sup> In this respect, the CJEU, has defined ‘sufficiently serious’ as meaning a ‘manifest and grave disregard by the institution for the limits of its discretion’.<sup>112</sup> In determining whether an institution has manifestly and gravely disregarded the limits of its discretion, the EU Courts will essentially have regard to two principal elements: (i) whether the institution has behaved in a manner verging on the arbitrary; and (ii) whether the consequences of that behaviour exceeded the bounds of the economic risks inherent in the applicant carrying on business in the relevant sector.<sup>113</sup>

Where the relevant EU institution enjoys a broad margin of discretion, it can prove very difficult for an applicant to demonstrate that the institution has manifestly and gravely disregarded the limits of that discretion—even if the act itself has been annulled. This point was clearly demonstrated in a series of cases stemming from two regulations by which the EU attempted to regulate the over-production of milk in the EU. By a first regulation, the EU introduced a scheme under which dairy farmers were paid a premium for agreeing not to market milk for a period of five years. During the five-year period, new measures introduced a system of milk quotas, based on the previous year’s production levels, under which farmers were required to pay a special levy on milk produced over and above their quota. The first regulation did not make special provision for the farmers who had agreed not to market their milk. When the five-year period came to an end, the farmers were left in a position where they were no longer receiving a premium, and were unable to start marketing milk again because, based on the previous year’s production, their quota was set at zero. The first regulation was annulled on the basis that it infringed the farmers’ legitimate expectations that they would be able to re-start their milk production activities after five years.<sup>114</sup>

As such, the EU introduced a second regulation setting the applicants’ quotas at 60 per cent of the milk they marketed in the year preceding that in which they stopped production. The CJEU also annulled the second regulation—also on the grounds that it infringed the farmers’ legitimate expectations. In *Mulder II*, the applicants also brought an action for damages. The CJEU concluded that while the applicants were entitled to damages as a result of the first regulation, because the Council had failed to consider the applicants’ position at all, this was not the case with respect to the second regulation. In this case, the Council had taken the farmers’ positions into account in setting the quota and, even if the level of the quota breached the farmers’ legitimate expectations, the Council did not demonstrate a manifest disregard of its discretion that was sufficient to entitle the applicants to damages with respect to the second regulation.

In contrast to situations such as those described above, where the EU enjoys a broad margin of discretion, if the EU institution has only considerably reduced, or even no, discretion,

<sup>111</sup> Case T-429/05 *Artegoda v Commission* (n 108) para 54; Case T-351/03 *Schneider Electric v Commission* (*Schneider II*) EU:T:2007:212, para 125; and Case T-212/03 *MyTravel v Commission* EU:T:2008:315, para 42.

<sup>112</sup> See eg Joined Cases 83 and 94/76, 4, 15, and 40/77 *HNL v Council and Commission* EU:C:1978:113; Joined Cases 116 and 124/77 *Amylum v Council and Commission* EU:C:1979:273.

<sup>113</sup> Joined Cases 116 and 124/77 *Amylum v Council and Commission* (n 114) paras 19–21; Joined Cases C-67–85/75 *Dumortier Frères and Others v Commission* (n 75) paras 21–22; Case 120/86 *Mulder v Minister van Landbouw en Vissereij* (*Mulder I*) EU:C:1988:213, para 24, and the Opinion of AG Van Gerven in Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* (*Mulder II*), EU:C:2000:38. For an extra-judicial commentary on the concept of a sufficiently serious breach, see also W Van Gerven, ‘Non-Contractual Liability of Member States, EU Institutions and Individuals for Breaches of EU Law with a view to a Common Law for Europe’ (n 18) 27–28.

<sup>114</sup> See Case 120/86 *Mulder v Minister van Landbouw en Vissereij* (*Mulder I*) (n 113); see also Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* (*Mulder II*) (n 113).

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the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.<sup>115</sup>

While the degree of discretion enjoyed by the relevant institution will, in many cases, be determinative, it would be a mistake to think that the absence of discretion will automatically result in the infringement being classified as a sufficiently serious breach of EU law such that an applicant will be entitled to recover compensation. While the extent of the discretion enjoyed by the institution concerned is of primary importance, it is not the only yardstick applied by the EU Courts. Rather, the complexity of the situation and the difficulties in the application or interpretation of the relevant legislation and whether the error made was intentional or inexcusable also needs to be taken into account,<sup>116</sup> in conjunction with an assessment of the degree of discretion enjoyed by the relevant EU institution. As such, even if the institution in question does not enjoy any discretion in a given matter, only the finding that an irregularity would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence will result in the EU being held liable in damages.<sup>117</sup>

#### (3) Liability for Lawful Acts

Although a measure need not formally have been declared illegal under Article 263 TFEU for an applicant to be successful in damages, illegality is a pre-condition for being awarded compensation. Indeed, the CJEU has expressly held that, as EU law currently stands, the requirement that an act or omission constitute a breach of EU law in order for an applicant to be entitled to damages under Article 340(2) TFEU excludes the possibility of damages being awarded to compensate for loss suffered as a result of the effects of legal conduct by the institution.<sup>118</sup> Two points are, however, worth noting in this respect.

First, in its ruling in *FLAMM*, the CJEU noted that where the measure in question, despite being lawful, constitutes a disproportionate and intolerable interference with rights guaranteed under EU law, an award of damages under Article 340(2) TFEU may be possible where the EU has failed to set up a regime to compensate individuals for such interference.<sup>119</sup> It is clear, however, that damages awarded in such cases are not, strictly speaking, based on a lawful act. Rather, it is the institution's unjustified failure to establish a compensation scheme which attracts liability.

Secondly, while an applicant may not, currently, be able to claim damages on the basis of a legal act, the Court has not ruled out the development of such a principle in the future.<sup>120</sup> As such, in *Dorsch Consult*,<sup>121</sup> despite leaving open whether, as a matter of principle, damages could be recovered for legal acts, the General Court (GC) nevertheless went on to set out the

<sup>115</sup> Case C-352/98 P *Bergaderm and Goupil v Commission* (n 13) paras 42–44; and T-225/99 *Comafica and Dole Fresh Fruit Europe v Commission* EU:T:2001:184, para 134.

<sup>116</sup> Case C-385/07 P *Der Grüne Punkt—Duales System Deutschland v Commission* EU:C:2009:456, paras 181–82; Case C-578/11 P *Deltafina v Commission* (n 107); Case C-467/13 P *ICF v Commission* (n 107); Case C-58/12 P *Groupe Gascogne v Commission* (n 29); Case C-50/12 P *Kendrion v Commission* (n 29); Case C-243/12 P *FLS Plast v Commission* (n 110).

<sup>117</sup> Case T-333/10 *ATC and Others v Commission* EU:T:2014:842, para 63; Case T-429/05 *Artegoda v Commission* (n 108) paras 59–62; Case T-341/07 *Jose Maria Sison v Council* (n 106) paras 33, 35–37; Case T-28/03 *Holcim (Deutschland) v Commission* (n 110) paras 114–116.

<sup>118</sup> Joined Cases C-120 and 121/06 *FLAMM and FLAMM Technologies v Council and Commission* (n 34) paras 164–79.

<sup>119</sup> *Ibid* paras 183–84.

<sup>120</sup> *Ibid* para 169.

<sup>121</sup> Case T-184/95 *Dorsch Consult v Council and Commission* EU:T:1998:74, para 80.

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conditions that would need to be satisfied for such a claim to succeed. The GC concluded that compensation would only be granted where the applicant satisfied three criteria: the applicant must have suffered both (i) ‘special’ and (ii) ‘unusual’ damage, and (iii) the measure giving rise to the alleged damage was not justified by a general economic interest. Damage will be considered as ‘unusual’ if it exceeds the limits of the economic or technical risks inherent in operating in the sector concerned and ‘special’ if it affects a particular class of economic operators in a disproportionate manner in comparison to other operators. On the facts of the case before it, the GC concluded that the applicant had suffered neither special nor unusual damage.<sup>122</sup>

### (4) Causation

The EU will only be liable to make good objectively foreseeable losses or injuries that have been directly *caused* by the EU.<sup>123</sup> This requires the applicant to establish a sufficiently direct causal link between the alleged breach and the damage suffered.<sup>124</sup> When assessing whether such a direct link exists, the EU Courts start from the premise that a comparison needs to be made between the situation brought about by the unlawful decision in question, and the situation that would have existed had the decision been adopted legally.<sup>125</sup> In many cases, this will require the applicant to demonstrate that, had the breach not occurred, the content of the measure in question would have been different.<sup>126</sup> For example, in *Schneider Electric*,<sup>127</sup> the applicant claimed damages following the annulment of a Commission decision prohibiting a merger to which Schneider was a party. In order to succeed in its claim for damages, the GC held that Schneider needed to show that had the Commission not committed a breach it would have cleared the merger. The mere fact that the Commission’s decision had been annulled did not necessarily mean that it was the wrong decision. It could not be assumed that had the Commission not committed a breach it would have cleared the merger. It was up to the applicant to prove that this was the case.

Where the applicant fails to discharge this evidential burden the link between the breach and the loss will be judged too tenuous to be considered direct, and the applicant will not be able to recover. The likelihood of proving that a direct link exists between the measure in question and the damage will, therefore, be dependent upon the amount of discretion available to the institution. Where the institution has only limited discretion and a limited number of options in the way it comes to a decision it will be reasonably straightforward for the applicant to show what would have happened had the breach not occurred. Where

<sup>122</sup> For examples of situations when the EU Courts have assessed whether the alleged damage is special or unusual within the meaning of the *Dorsch Consult* test see Case T-196/99 *Area Cova v Council and Commission* EU:T:2001:281; Case T-170/00 *Förde-Reederei v Council and Commission* EU:T:2002:34, para 56; Joined Cases C-120 and 121/06 *FIAMM* (n 34) Opinion of AG Maduro of 20 February 2008 EU:C:2008:98 (for a comment on this case see A. Thies, Case note (2006) 43 *Common Market Law Review* 1145); Case T-279/03 *Galileo International Technology and Others v Commission* EU:T:2006:121; Case T-333/03 *Masdar v Commission* (n 34); Case T-388/07 *Comune di Napoli v Commission* EU:T:2010:177, paras 184–88; Order of 11 September 2013 in Case T-540/11 *Melkveebedrijf Overenk and Others v Commission* EU:C:2014:2118, para 12; Case T-317/12 *Holcim (Romania) v Commission* (n 103) paras 73–75, 79–80; Joined Cases C-12 and 13/13 *P. Buono and Others v Commission* EU:C:2014:2284, paras 43, 46, and 64.

<sup>123</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* (n 67); Case 4/69 *Alfons Lütticke GmbH v Commission* (n 4) para 10; Case T-184/95 *Dorsch Consult v Council and Commission* (n 121).

<sup>124</sup> Case T-149/96 *Confederazione Nazionale Coltivatori Diretti (Coldiretti) and 110 farmers v Council and Commission* EU:T:1998:228, para 101; Case T-178/98 *Fresh Marine v Commission*, EU:T:2000:240, para 118.

<sup>125</sup> Case T-351/03 *Schneider Electric v Commission (Schneider II)* (n 111) paras 264–65.

<sup>126</sup> Case T-252/07 *Sungro and Others v Council and Commission* EU:T:2010:17, paras 60–63.

<sup>127</sup> Case T-351/03 *Schneider Electric v Commission (Schneider II)* (n 111) paras 264–65.

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the institution enjoys a greater level of discretion, however, and can implement a measure in different ways, taking into consideration different factors, it will be difficult for the applicant to satisfy the causation requirements. In addition, the EU Courts assume that the prudent person will mitigate the loss suffered. Where the applicant has failed to do this, the EU Court will hold that his acts have contributed to the loss suffered, and reduce the amount of compensation accordingly.<sup>128</sup> Furthermore, possible negligence on the part of the applicant may even break the chain of causation altogether, leaving the applicant without any compensation.<sup>129</sup>

#### (5) Damages

Once an applicant has satisfied the Court that all of the conditions for liability exist, it is up to the Court to assess whether damages should be awarded and, if so, how much the applicant should receive. Although in the vast majority of cases the applicant in a case brought pursuant to Article 340(2) TFEU will be seeking financial compensation, the EU Courts are not limited to granting only financial compensation. Rather, the EU Courts have the power to impose compensation in kind, such as, for example, the granting of an injunction to do or not to do something, if this accords with the general principles of non-contractual liability common to the laws of the Member States.<sup>130</sup>

The underlying principle when awarding compensation is to put the applicant in, or as close as possible to, the position that it would have been in, had the unlawful act not been adopted.<sup>131</sup> However, even if an applicant has convinced the Court that it is entitled to receive damages, this does not mean that it will be able to recover compensation for the entirety of its potential loss. Applicants are only entitled to be compensated for losses that are actual and certain and it is up to the applicant in each case to demonstrate the existence of such loss.<sup>132</sup> As such, the applicant must put forward evidence of the damage claimed; the nature and the, at least approximate, extent of that damage.<sup>133</sup> A general claim for unspecified damages will not, under normal circumstances, be sufficiently concrete for an application to be valid and the claim is therefore liable to be dismissed.<sup>134</sup> Similarly, a claim for an amount of damages without any indication of the calculation leading to that amount will also usually be dismissed as insufficiently substantiated.<sup>135</sup> Furthermore, where an applicant has, or could reasonably have been expected to have, ‘passed-on’ any losses suffered—for example,

<sup>128</sup> See, to that effect, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 11) paras 82–85.

<sup>129</sup> Case T-572/93 *Odrigitria v Council and Commission* EU:T:1995:131.

<sup>130</sup> Case T-279/03 *Galileo International Technology and Others v Commission* (n 122) para 63; Case T-88/09 *Idromacchine and Others v Commission* EU:T:2011:641, para 81.

<sup>131</sup> Case C-238/78 *Ireks-Arkady v Council and Commission* EU:C:1979:203.

<sup>132</sup> Case C-611/12 P *Giordano v Commission* EU:C:2014:2282, para 36; Case C-243/05 *Agraz v Commission* EU:C:2006:708, para 27; C-51/81 *De Franceschi v Council and Commission* EU:C:1982:20, para 9; Case 267/80 *Birra Wührer SpA and Others v Council and Commission* (n 78) para 9; and Case C-362/95 P *Blackspur DIY and Others v Council and Commission* EU:C:1997:401, para 31.

<sup>133</sup> Case T-64/89 *Automec Srl v Commission* EU:T:1990:42, para 73; Case T-149/96 *Confederazione Nazionale Coltivatori Diretti (Coldiretti) v Council and Commission* (n 123). See also Joined Cases 29, 31, 36, 39–47, 50, and 51/63 *SA des Laminoirs, Hauts Fourneaux, Forges, Fonderies et Usines de la Providence and Others v High Authority* EU:C:1966:29, where the ECJ held that an ‘exact assessment’ of the damage sustained is needed, but an approximate determination based on sufficiently reliable facts, preferably collected by an expert, will suffice if it is not possible to make an exact assessment. See also Case 90/78 *Granaria BV v Council and Commission* [1979] ECR 1081, paras 5 and 6.

<sup>134</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* (n 67) 984; Case T-149/96 *Confederazione Nazionale Coltivatori Diretti (Coldiretti) and 110 farmers v Council and Commission* (n 124) para 173.

<sup>135</sup> Case C-401/96 P *Somaco v Commission* EU:C:1998:208, para 73.

## VI. Conclusions

by increasing prices to customers to offset an illegally levied charge—the applicant will not be entitled to an award of damages.<sup>136</sup>

With respect to the types of damages that can be recovered, the EU Courts have previously recognized a number of different heads of damages. These include damages in the form of lost profits, losses of future earnings, and non-material damage.

In respect of lost profits, the EU Courts are only willing to allow applicants to recover such damages to the extent that the applicant can show that it was legitimately entitled to make the profit and was only prevented from doing so by an unlawful act of the EU.<sup>137</sup> Regarding future losses, such harm can be compensated provided that the damage—even if it cannot be precisely quantified<sup>138</sup>—is foreseeable with sufficient certainty. The Court will not allow a claim for future damages, however, where the damage ‘appears to be possible’ or ‘might ensue in the future’. Such a claim will be too doubtful and insufficiently precise.<sup>139</sup>

The Court has also been willing to award compensation for non-material losses. In *Algera*, the Court awarded Miss Algera, an EU employee whose appointment had been wrongfully withdrawn, US\$100 in respect of the upheaval and discomfort that the EU action had caused her.<sup>140</sup> The Court has also been willing to accept a claim in damages as a result of damage caused to the applicant’s reputation,<sup>141</sup> damage caused by a five-year delay in handling a request for recognition of a professional illness,<sup>142</sup> and erroneous exclusion from an internal competition.<sup>143</sup> In many cases, however, the Court has simply ruled that the annulment of the contested decision sufficiently repaired any injury to the applicant and, therefore, did not grant damages.<sup>144</sup>

## VI. Conclusions

Damages actions under EU law are a rather strange creature shaped by multiple influences and, as with any procedure, the devil is in the detail. It must also be admitted that despite the formal equality between actions against Member States and actions against the EU, and their common substantive bases following *Bergaderm*, there are still many differences between the two. Furthermore, the success of an action for damages should ultimately be measured in terms of monetary success. There are unfortunately still too few statistics on the outcome of actions before national and EU courts with detailed figures and reliable data to be able to perform such an analysis. However, regardless of the different opinions and the many shortcomings, we would humbly suggest that even if it is widely accepted that damages might not always be the most effective form of redressing the effects of

<sup>136</sup> Case C-238/78 *Ireks-Arkady v Council and Commission* (n 131) para 14; see further C. Rudden and W. Bishop, ‘Gritz and Quellmehl: Pass It On’ (1981) 6 *European Law Review* 243.

<sup>137</sup> Joined Cases 5, 7, and 13–24/66 *Kampffmeyer and Others v Commission* (n 96).

<sup>138</sup> *Ibid* paras 6–8.

<sup>139</sup> Case 147/83 *Münchener Import-Weinkellerei Herold Binderer GmbH v Commission* EU:C:1985:26, paras 19–20.

<sup>140</sup> Joined Cases 7/56, 3–7/57 *Dineke Algera and Others v Common Assembly* EU:C:1957:7. See also Case 25/60 *De Bruyn v Common Assembly* EU:C:1962:6.

<sup>141</sup> Case T-231/97 *New Europe Consulting and Brown v Commission* EU:T:1999:146.

<sup>142</sup> Case T-165/89 *Plug v Commission* EU:T:1992:27.

<sup>143</sup> Case T-84/91 *Meskens v Parliament* EU:T:1992:103.

<sup>144</sup> See Joined Cases 59 and 129/80 *Turner v Commission* EU:C:1981:170, paras 73–74; Case T-100/98R *Goldstein v Commission* EU:T:1998:252, para 22.

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tortious actions or of providing full satisfaction to the individuals affected, the right to compensation is a basic principle of not only all the European legal systems but of our civilization as well—and the ability to bring an action for damages has a rightful place in the EU system of judicial protection. In this regard, if read in its entirety, the *corpus iuris precept*, usually identified as one of the first codifications of a damages action, is ‘*honeste vivere, alterum non laedere, suum cuique tribuere*’.<sup>145</sup> That is, in modern English: you should not only refrain from injuring one another but also live honestly, and to give to each one that which belongs to him or her.

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<sup>145</sup> Justinian’s *Institutiones* 1,1,3–4.